No. 04-15328

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan, and other similarly-situated plans, and
TARA MACKNER, on behalf of the KMart Comprehensive Health Plan
Plaintiffs-Appellants

v.

ADVANCEPCS HEALTH, L.P.
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REQUESTING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Other Authorities:

STATEMENT OF INTEREST

The Secretary of the United States Department of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

The issues in this case are: (1) whether ERISA authorizes plan participants and beneficiaries to bring an action for a fiduciary breach under section 502(a)(2) and (a)(3) against a defendant that is not a "named plan fiduciary" with respect to the ERISA covered plan, but that allegedly is a functional fiduciary under ERISA; (2) whether the participants and beneficiaries have constitutional standing to bring such a suit where they have not personally suffered an injury in fact; and (3) whether they must establish their right to equitable remedies in order to maintain such a suit. The Secretary has a significant interest in these issues, both as a general matter in order to ensure that ERISA section 502(a)(2) and (a)(3) are interpreted broadly to protect participants, beneficiaries and/or fiduciaries who uncover and attempt to remedy statutory violations, and more specifically to protect her own enforcement role under section 502.

QUESTIONS PRESENTED

1. Whether plan participants are authorized under section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132 (a)(2) and (a)(3), to bring an action on behalf of the Plan for a fiduciary breach by a party that is a functional rather than a named fiduciary.

2. Whether the participants, as plaintiffs in this case, lack constitutional standing because they cannot personally show injury in fact.

3. Whether the alleged losses to the Plans and other remedies that the participants seek are recoverable under section 502(a)(2) and (a)(3).

STATEMENT OF THE FACTS

Tommie Glanton is a participant in and a beneficiary of the ALCOA Prescription Drug Plan. Glanton's Second Amended and Restated Complaint, p. 2 [Record Excerpts, p. 32]. Tara Mackner was, but no longer is, a member and beneficiary of the KMart Comprehensive Healthcare Plan. Order, p. 2 [Record Excerpts, p. 112]. Both Plans are self-funded with each employer paying for its employees' prescription drug benefits. Since January 1, 2000, Glanton has contributed to the purchase of various

In this role, Advance contracts with retail pharmacies and drug manufacturers to provide prescription drugs at a discounted rate for the benefit of the Plans. Glanton Complaint, pp. 2-3 [Record Excerpts, p. 32-33]. Advance also receives money from pharmaceutical companies in the form of rebates, discounts, and other compensation when Plan participants use particular pharmaceutical drugs. Glanton Complaint, pp. 2-3 [Record Excerpts, p. 38]. Advance does not pass this compensation or savings through to the Plans and does not disclose the nature or extent of its relationship with the retail pharmacies or manufacturers to the Plans or their participants and beneficiaries. Order, p. 2 [Record Excerpts, p. 112]. Thus, Appellants contend that Advance has acted in its own financial interests, at the expense of the Plans and their participants, in its dealings with the retail pharmacies and manufacturers, and has thereby violated both its general duty of loyalty under ERISA section 404, 29 U.S.C. § 1104, and has engaged in various prohibited transactions in violation of ERISA section 406(b), 29 U.S.C. § 1106 (b). Glanton Complaint, pp. 10-12 [Record Excerpts, p. 38].

Advance acknowledges that it acts as a PBM to the Plans at issue in this case, but denies that it is a fiduciary in this role. Order, p. 2 [Record Excerpts, p. 112]. It asserts that it has not taken any rebate monies from the

Plans that are the subject of this lawsuit. Rather, Advance maintains that it receives the funds in question from pharmaceutical companies pursuant to the terms of the PBM contracts between Advance and its customers.

PROCEDURAL BACKGROUND

Appellant Glanton brought suit on behalf of himself and other similarly situated plan participants and beneficiaries of self-funded welfare benefit plans against Advance under ERISA sections 409 and 502(a)(2) and (a)(3), alleging that Advance engaged in self-dealing and other prohibited transactions, and was unjustly enriched with rebates, administrative fees, and other unlawful and unreasonable compensation. Likewise, Appellant Mackner filed her complaint as a class action on behalf of similarly situated participants and beneficiaries of the KMart Comprehensive Healthcare Plan. The two cases, which have been consolidated, seek an injunction, an accounting, disgorgement of profits, as well as the imposition of a constructive trust for disposition to the Plans.

Advance sought dismissal of the cases below on two alternative grounds. First, Advance argued that Appellants lacked Article III standing because they have not been personally injured and a judgment against Advance would not inure to their benefit. Second, Advance argued that Appellants' consolidated complaint must be dismissed for failure to state a

The court expressly recognized that "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Warth v. Seldin, 422 U.S. 490, 500 (1975) (citing Sierra Club v. Morton, 405 U.S. 727, 732 (1972)). Nevertheless, the court reasoned that, "a statutory creation of rights does not eliminate the requirement that a plaintiff have constitutional standing." Instead, the court reasoned, in considering whether standing exists, courts must determine "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Order, pp. 3-4 [Record Excerpts, pp. 152-53].

In interpreting the enforcement provisions of ERISA, the court recognized that ERISA grants a right of action to participants and beneficiaries, (citing Massachusetts Mut. Life Ins. Co v. Russell, 473 U.S. 134 (1985)). Order, p. 4 [Record Excerpts, p. 153]. Nevertheless, the court concluded that the plan participants and beneficiaries are not the proper parties to bring an action seeking relief for the plan, because "Plaintiffs allege a breach of fiduciary duty by an entity that is not a named fiduciary of the Plans." Id. at 6.[1] The court found it significant that "[a]ny funds recovered by virtue of this lawsuit would not return to Defendant's hands. Instead, the funds would be managed and administered by the named plan fiduciaries, who are not charged with wrongdoing." Id. at 7. The court then rejected the Plaintiffs' argument that they had "'representational standing' to sue for injury to their Plans," reasoning that "Plaintiffs are not statutorily designated as fiduciaries and are not assigned the legal responsibility to sue others." Id. at 7.

Finally, the Court concluded that, "even if the Court were to agree Plaintiffs were the proper parties to bring a class action against Defendant, the Court is unpersuaded that the remedy they seek is appropriate under the circumstances." Order, p. 8 [Record Excerpts, p. 157]. The Court characterized the remedy sought by Glanton and Mackner as the enforcement of a constructive trust. Since the Court was unable to determine whether the rebates and volume discounts retained by Advance were plan assets or "ill-gotten" profits that could be returned to the Plans in

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[1] In a footnote, the court somewhat cryptically stated, "the Court recognizes that an unnamed fiduciary may be charged with breaching a fiduciary duty under ERISA, however, Plaintiffs have provided no basis for extending the reasoning of Murdock [Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988)] and Waller [Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994)], to the distinguishable circumstances of this case." Order, p. 7 n.2 [Record Excerpt, p. 156].

the same sense as the money taken from the pension plans in Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir.1988) and Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994), the Court declined to find that relief was warranted.

On November 20, Glanton and Mackner filed a Motion to Alter or Amend Judgment, which the district court denied on January 23, 2004. [Record Excerpt, p. 190]. From this denial, Glanton and Mackner perfected their appeal.

SUMMARY OF THE ARGUMENT

The district court erred in holding that the Plaintiffs lacked standing to bring their suit on behalf of the Plans. There is no question that participants and beneficiaries have statutory standing under section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of a plan for a fiduciary breach. See Waller v. Blue Cross of California, 32 F.3d at 1339; Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d at 1409. Moreover, courts, including the Ninth Circuit have long recognized that ERISA provides a functional, as well as a formal definition of fiduciary, and thereby allows plaintiffs to sue not only those who are named fiduciaries, but also anyone who acts in a fiduciary capacity. See Acosta v. Pac. Enters., 950 F.2d 611, 618 (9th Cir. 1991) ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"). The district court simply misconstrued the statute and the governing case law on these points.

Furthermore, since the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recoverable by the Plans, which have allegedly been injured by fiduciary breaches. This is enough to establish standing for Article III purposes.

Finally, the district court erred in concluding that the remedies that the Appellants seek are not authorized under the statute. Even assuming that some of the remedies sought are unavailable under section 502(a)(3), all are available under the broad remedial provisions of section 502(a)(2).

I. Participants and beneficiaries are authorized under section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of their plans against a functional fiduciary for breach of duty

ERISA section 502(a)(2), the second of ERISA's "six carefully integrated civil enforcement provisions," Russell, 473 U.S. at 146, expressly authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title." 29 U.S.C. §

1132(a)(2). Section 409(a), 29 U.S.C. § 1109(a), in turn, makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: the fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting from each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. As the Supreme Court in Russell put it "[t]here can be no disagreement with the Court of Appeals' conclusion that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." 473 U.S. at 140. Nor can there be any disagreement that section 502(a)(3), by its terms, authorizes a cause of action for "appropriate equitable relief" by "a participant, beneficiary or fiduciary." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 253-55 (1993). Thus, the district court erred to the extent it concluded that only plan fiduciaries and not participants and beneficiaries are "assigned the legal responsibility to sue others." Order, p. 7, [Record Excerpt, p. 156].[2]

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[2] There are cases that hold that participants are not entitled to sue an employer for contributions unless they first establish that the plan trustees breached their fiduciary duties by failing to sue the employer. See Struble v.

More fundamentally, the court erred in dismissing the Complaint merely because the Appellants were suing an entity that is not a named fiduciary of the Plans. Under ERISA, a "named fiduciary" is "a fiduciary who is named in the plan instrument, or who ... is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly." 29 U.S.C. § 1102(a)(2). ERISA, however, "provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see § 1002(21)(A), is an ERISA 'fiduciary.'" Mertens, 508 U.S. at 251.

New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912 (2d Cir. 1989). Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), provides plan fiduciaries with remedies to enforce employer plan contribution obligations pursuant to section 515, 29 U.S.C. § 1145, but does not authorize such suits by plan participants. Thus, a participant may not bring a derivative action against the employer unless the trustees have failed to bring such a suit. See A. Scott, 4 Law of Trusts § 282.1 (3d ed. 1967) ("if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant"). Moreover, the delinquent contribution cases all involve participant actions against non-fiduciaries. Because the participants here are directly suing a fiduciary for fiduciary breaches, neither Struble nor Diduck support the district court's holding.

Thus, ERISA expands the definition of fiduciary beyond the common law's formalistic approach to encompass all those who function as fiduciaries. To this end, section 3(21)(A), 29 U.S.C. § 1002(21)(A) provides:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Many courts have recognized the broad sweep of this functional definition. Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998) ("the statute also extends fiduciary liability to functional fiduciaries"); Olsen v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992); Acosta v. Pac. Enters., 950 F.2d at 618 ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"); Sladek v. Bell Sys. Mgmt. Pension Plan, 880 F.2d 972, 976 (7th Cir. 1989); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Blatt v. Marshall & Lassman, 812 F. 2d 810, 812 (2d Cir. 1987); Donovan v. Mercer, 747 F.2d 304, 305 (5th Cir. 1984) ("If it Talks Like a Duck..."); Eaves v. Penn, 587 F.2d 453, 458-59 (10th Cir. 1978); McKinnon v. Cairns, 698 F. Supp. 852, 860 (W.D. Okla. 1988); Brock v. Self, 632 F. Supp. 1509, 1521 (W.D. La. 1986). Under this definition, persons who carry out the basic fiduciary functions relating to asset management, plan administration, and provision of investment advice for a fee are routinely held to be fiduciaries. See, e.g., Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d Cir. 1987); Jones v. American Gen. Life & Accident. Ins. Co., 370 F.3d 1065, 1072 (11th Cir. 2004).[3]

While the district court in the present case appears to assume that Advance is not a fiduciary, see Order, p. 7 n.2 [Record Excerpts, p. 117], this issue is not properly disposed of on the pleadings. Instead, because Appellants have alleged that Advance is both a functional fiduciary and a named fiduciary, they should be allowed to proceed to the merits of their case. See ALCOA Retiree Benefits Handbook, p. 4 [Records Excerpts, p 66] supporting Appellants' allegations that Appellee's predecessor-in-

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[3] Nonetheless, ERISA section 3(21)(A) provides a limitation on fiduciary status. Specifically, the statute provides that a person is a fiduciary only "to the extent" he performs one of the defined fiduciary functions. See Pegram v. Herdrich, 530 U.S. 211 (2000). Thus, one who takes on limited fiduciary duties is not a fiduciary for all purposes. John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 510 U.S. 86 (1999). To the contrary, a person may be a fiduciary when he does certain tasks, but he may be entitled to act in his own interest when he does other tasks. Beddall v. State Street Bank & Trust Co., 137 F.3d 12 (1st Cir. 1998).

interest, PCS Health Systems, Inc., is designated in the ALCOA Retiree Benefits Handbook as the Prescription Drug "Claims Administrator" for the ALCOA Plan.[4]

II. Participants and beneficiaries who sue under section 502(a)(2) and (a)(3) have standing to sue on behalf of their plans and thus need not show that they personally have suffered injury in fact

It is not enough that Appellants have a statutory cause of action. They must also, of course, establish Article III standing, the requirements of which are injury in fact, causation and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Advance argues that Appellants have failed to establish injury in fact because they cannot show that they personally have been injured by any arrangements that Advance may have had with pharmaceutical companies. They note that the primary harm alleged is to the Plans and not directly to the participants and beneficiaries, and any increased costs (or conversely savings) would not necessarily be passed on to the participants and beneficiaries. However, "[t]he actual or threatened injury required by Article III may exist solely by virtue of statutes requiring legal rights, the invasion of which creates standing." RJR Cab,

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[4] The Secretary takes no position on whether Advance is a named or functional fiduciary, or whether Advance violated any ERISA duties. Instead, the Secretary submits this brief solely to address the merits of the legal issues.

Inc. v. Hodel, 797 F.2d 111, 118 (3d Cir. 1986) (quoting Warth v. Seldin, 422 U.S. at 499-500. Thus, where, as here, an entity is alleged to have violated its statutory duties as a fiduciary to ERISA plans, that violation creates standing in those (such as the participants) who are authorized to sue to enforce those duties. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., with whom Blackmun and Powell, J.J., join, concurring) (statute conferred standing that would have been doubtful under Article III in the absence of the statute).

Similarly, the Supreme Court has recognized that a statute may create representational standing, whereby the statutorily-designated party sues to redress an injury suffered by another. Thus, in a False Claims Act case brought by a private party (a "qui tam relator "), who personally suffered "no…invasion " of any "legally protected right," the Supreme Court held "that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 773 (2000).

More specifically, in the ERISA context, the Supreme Court has expressly recognized that:

> § 502(a)(2), the enforcement provision for § 409, authorizes suit by four classes of party-plaintiffs:

> the Secretary of Labor, participants, beneficiaries, and fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes is the financial integrity of the plan.

Russell, 473 U.S. at 142 n.9. Thus, Russell clarified that the enumerated parties are authorized by ERISA to bring suit on behalf of the plan, and each is statutorily empowered with representational standing to do so. See Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (sections 409 and 502(a)(2) only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"). There is no need to show that the party authorized to sue personally has suffered an injury in fact. Rather, the party need only show that the plan may be entitled to relief.[5]

Indeed, in holding that ERISA does not permit claims for compensatory damages (which it termed "extra contractual"), or for punitive damages, the Supreme Court reasoned that those who sue under section 502(a)(2) may do so only to recover for an injury to the plan. Russell, 473 U.S. at 148; accord In re Occidental Petroleum Corp., 217 F.3d 293, 297

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[5] Because, as we argue in text, the plaintiffs have representational standing under section 502 to sue to redress the alleged injures to the Plans, they meet the causation and redressability prongs of Article III standing as well. Plaintiffs' claim that the disloyal actions by Advance injured the Plans, and injunctive or monetary relief could conceivably remedy that injury. Again, the focus of inquiry is on the Plans.

n.14 (5th Cir. 2000); Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995); Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993); Hozier, 908 F.2d at 1162 & n.7; Bryant v. Int'l Fruit Prod. Co., 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988); Sokol v. Berbstein, 803 F.2d 532, 537 (9th Cir. 1986). Given that section 502(a)(2) therefore does not encompass claims for individual relief at all, courts following Russell have denied recovery to participants and beneficiaries suing for relief under this provision. See, Hozier, 908 F.2d at 1162 n.7 (claim to recover individual benefits not authorized under sections 409 and 502(a)(2) because these provisions only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"); Carr v. Malcolm & Riley, P.C., No. 90-6407, 1991 WL 67749, at *8 (E.D. Pa. Apr. 25, 1991) (same). It would be irrational, indeed, to conclude that participants must show individual harm in order to have standing to sue under section 502(a)(2), but that they cannot individually recover for that harm under that very provision.[6]

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[6] Although section 502(a)(3) does allow claims for individual relief, as the Supreme Court held in Varity Corp. v. Howe, 516 U.S. 489, 515 (1996), there is little question that it too allows actions for "appropriate equitable relief" running to the plan. Indeed, the Supreme Court granted certiorari in Varity to resolve the split in the lower courts as to whether the relief available under section 502(a)(3), like that available under section 502(a)(2), is limited to relief to the plan. Id. at 495. In holding that it is not so limited,

Advance, however, relies on the Eighth Circuit's holding in Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901, 906-07 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) that the participants and beneficiaries in that case lacked standing to bring fiduciary breach claims following an investment loss of close to $20 million to their defined benefit plan. The court there reasoned that the participants and beneficiaries were unable to show that they had suffered any harm from this loss because, under a defined benefit plan, the employer must cover any under-funding, and because, in this particular case, the employer (who was one of the parties being sued) had infused the plan with sufficient funds to create a sizable surplus. Id. at 903-04.

This Court should not apply the reasoning of Harley to this case for two reasons. First, Harley itself limits its holding to the "unique circumstances" of a suit against an over-funded defined benefit plan. Harley, 284 F.3d at 905. Second, and more fundamentally, the decision is

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the court in no way questioned that participants and beneficiaries may bring suit under section 502(a)(2) for equitable relief to remedy injuries to their plans, and many cases have allowed such suits without comment. See Wald v. Southwestern Bell Corp. Customcare Med.Plan, 83 F.3d 1002 (9th Cir. 1996).

simply wrong and cannot be squared with the statute or with the Supreme Court's reading of it in Russell, as we discuss above.[7]

We note that in the present case, however, the participants and beneficiaries may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less

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[7] Nor is this Court's decision in Fernandez v. Brock, 840 F. 2d 622, 628 (9th Cir. 1988), to the contrary. In Fernandez, migrant farmworkers brought an action against the Secretary of the Treasury alleging that they had been harmed by the government's failure to promulgate regulations governing participation, accrual and vesting thresholds for pensions for seasonal workers. The farmworkers alleged that they might be able to obtain pension benefits if new regulations were issued that lowered the minimum hours-per-year-worked standard for participants in plans. This Court concluded that the farmworkers were required to satisfy the injury-in-fact requirement of Article III. Fernandez and the cases that it cites, however, all involved actions against government officials for failure to perform a statutory duty when the statute did not expressly provide for an action against the government. The question in those cases was not whether the invasion of a statutory right can create a sufficient injury for Article III purposes, but was simply "whether a statute that imposes statutory duties [implicitly] creates correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III." Id. at 630. Here, the statute expressly provides that a participant may sue individually or on behalf of his plan to redress fiduciary violations. There is no need, therefore, to go beyond the statutory language to determine whether a participant must show individual injury in order to bring suit.

restrictive formularies, and possibly a more comprehensive benefit structure. Although the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal, this does not foreclose the possibility that the Appellants may benefit directly from a judgment in their favor.

III. The remedies that Appellants seek are recoverable under section 502(a)(2)

In their Complaints, the Appellants seek to:

- Enjoin Appellee from engaging in the unlawful activities;
- Require Appellee to give an accounting to the Plans for (1) all Plan assets retained by Appellee for Appellee's own benefit and (2) all profits earned through the receipt of rebates and kickbacks;
- Require Appellee to account for and restore all losses suffered by the Plans; and
- Provide any other general, equitable, or remedial relief the Court deems just and appropriate under the circumstances.

Glanton Complaint, p. 25 [Record Excerpt, p. 55]; Mackner Complaint, p. 28 [Record Excerpt, p. 29]. Simply stated, the Appellants here seek an order that their Plans be made whole and that Advance, a breaching fiduciary, be enjoined from illegal practices in the future and be held liable to return any ill-gotten profits obtained through the use of Plan assets. In the Appellants' view, the rebates and discounts in this case represent an increased profit to Advance generated through the use of Plan assets.

The district court, however, reasoned that all these remedies are unavailable under ERISA. The court appears to have relied on language in ERISA section 502(a)(3), under which plaintiffs are limited to seeking injunctive or "other appropriate relief," a term the Supreme Court has interpreted as being limited to the type of relief that was typically available in equity in the days of the divided bench. Mertens, 508 U.S. at 254; Great-West, 534 U.S. at 209.[8]

Appellants here, however, have sued not just under section 502(a)(3), but also under section 502(a)(2), as noted above. The relief available under section 502(a)(2) is not limited, as is section 502(a)(3), to "appropriate equitable relief." Instead, through reference to section 409(a), 29 U.S.C. § 1109(a), section 502(a)(2) permits courts to impose personal liability on

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[8] We observe that this Court has broadly indicated that monetary relief is not available under ERISA section 502(a)(3), see Westaff (USA) Inc. v. Arce, 298 F.3d 1164, 1166 (9th Cir. 2002) and Bast v. Prudential Ins. Co. of Am., 150 F. 3d 1003, 1010 (9th Cir. 1998), despite explicit language in both Mertens and Great-West indicating that the imposition of a constructive trust over identifiable trust assets, and the disgorgement of profits improperly made using trust assets both constitute "appropriate equitable relief." Mertens, 508 U.S. at 254; Great-West, 534 U.S. at 209. The Secretary of Labor takes the position that the remedies that appellant seek – an injunction against future wrongdoing, a constructive trust and disgorgement of profits – are "appropriate equitable relief" under section 502(a)(3). This Court need not address the applicability of its prior decision in Westaff, however, since at least some of the relief sought (the injunction, for example) clearly is available under section 502(a)(3), and all of it is available under section 502(a)(2), as discussed in text below.

breaching fiduciaries for any "losses" to the plan, and subject them to "such other equitable or remedial relief as the court may deem appropriate." Under the express terms of these provisions, the available relief encompasses the return of "losses suffered by the Plans" and the just and appropriate "equitable, or remedial relief" sought by Appellants here. Likewise, the injunction that Appellants seek is clearly "equitable" relief under section 502(a)(2) (as it is under section 502(a)(3)).

Moreover, even if there is any doubt whether the disgorgement of profits that Appellants seek constitutes "appropriate equitable relief," as the term is used in section 502(a)(3), there can be little doubt that it is available under section 502(a)(2), given the broad remedial language of section 409. Taken together, these provisions grant courts the "broad authority to fashion remedies for redressing the interest of participants and beneficiaries." Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1984) (upholding a district court's appointment of an investment manager and the requirement that the breaching fiduciaries post a bond); accord Cavellini v. Harris, 188 F.3d 512 (9th Cir. 1999) (upholding the district court's order including in the recovery amount notes given by plan participants to enable them to invest in other of the defendants' ventures); Eaves v. Penn, 587 F.2d at 462-63 (upholding rescission of purchase sale agreement and restoration of plan's original liquid assets); S. Rep. No. 93-127, 93d Cong., 2nd Sess., reprinted in 1974 U.S.C.C.A.N. 4838, 4871 ("The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts."). This Court has correctly recognized that "[c]ourts also have a duty under ERISA sections 409 and 502(a)(2) 'to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust.'" Mazzola, 716 F.2d at 1235, quoting Eaves, 587 F.2d at 462. Under this precedent, it is clear that all of the remedies that Appellants seek are available under section 502(a)(2).

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and conclude that participants and beneficiaries may bring an action on behalf of the plan against a functional fiduciary under ERISA section 502(a)(2) and (a)(3) for appropriate equitable relief.

Respectfully submitted.

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Dated: JULY 1, 2004

CERTIFICATE OF COMPLIANCE

Case No. 04-15328

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant and Requesting Reversal of the District Court's Decision is proportional spaced, using Times New Romans typeface of 14 point and contains 5772 words.

Dated: July 1, 2004

Mary F. Williams

Mary F. Williams
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant and Requesting Reversal of the District Court's Decision were mailed to the following by U.S. mail, postage prepaid, on the 1st day of July 2004.

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